

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7089
ORIGINAL

To be argued by:
TIMOTHY A. HANAN

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

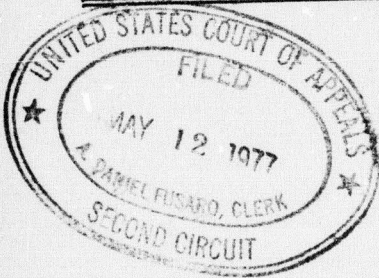
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P/S

THE CONTINENTAL INSURANCE COMPANY,
Plaintiff-Appellant,
—against—

HERSENT OFFSHORE, INC.,
Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF FOR PLAINTIFF-APPELLANT



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Preliminary Statement

The decision from which appeal has been taken was rendered by the Honorable Gerard L. Goettel, U.S.D.J. Neither an official nor an unofficial reporting of his decision has come to the attention of appellant.

Hereinafter appellant will be referred to as "Continental" and the appellee as "Hersent." Abbreviated refer-

ences to the Joint Appendix and the Joint Exhibit Volume pages will be indicated by "Jnt. App." and "Jnt. Ex. Vol.," respectively. Judge Goettel's Findings of Fact will be indicated by "FF" and his Conclusions of Law by "CL." Witnesses' last names will precede the pertinent page references and plaintiff's exhibits and defendant's exhibits will be indicated by "Pl. Ex." and "Def. Ex.," respectively.

Issues Presented for Review

1. Did Hersent breach express warranties stated in the marine Hull Policy covering its barge (and equipment aboard) which capsized in Long Island Sound in December of 1972?
2. Was the capsizing of the barge brought about by perils of the waters of Long Island Sound?
3. Was the implied warranty of seaworthiness of the barge breached?
4. Was Hersent's Project Manager, Robert J. Green, the "Master" of the barge in the context of the Hull Policy's "Inchmaree" clause covering loss or damage directly caused by negligence of "master, mariners, engineers or pilots" provided the loss or damage "has not resulted from want of due diligence by the assured, the owners or managers of the vessel, or any of them"? Further, did Hersent exercise due diligence towards maintaining the barge in a seaworthy condition?

Statement of the Case

(A) Nature of the case.

On March 19, 1973 Continental commenced its action (as later amended) in the District Court under the *Federal Declaratory Judgment Act*, 28 U.S. Code §2201, seeking a judgment declaring that it was not obligated to Hersent the insured, under a marine Hull Policy. (Def. Ex. A) nor under a Protection and Indemnity Policy (Def. Ex. B) in connection with the capsizing of Barge No. 136 during the weekend of December 15-17, 1972 in eastern Long Island Sound. Hersent claimed for recovery (by way of counterclaims) under each policy of marine insurance.

The Hull Policy insured the barge, a Manitowoc crawler crane, and miscellaneous equipment; the total sum insured being \$436,000.00. It covered specified marine perils and contained express warranties in a "Storm and Heavy Weather Plan" which was part of the insurance policy.

(B) Course of the proceedings and disposition in the Court below.

The Pre-Trial Order (Jnt. App. 13a-29a) was signed on January 21, 1976 and it provided that the liability issues be tried first and separately from the damages issues. The question as to which party should proceed first with the presentation of the evidence was briefed and argued before the Honorable Charles S. Haight, Jr, U.S.D.J., and on May 28, 1976 he directed that Hersent open the trial with proof that the loss resulted from a risk [or risks] insured against under the policies of insurance and that Continental thereafter go forward with proof of its allegations of breach of warranties.

The case was reassigned to Judge Goettel on July 8, 1976 and the non-jury trial was held during October 12-18, 1976. At the conclusion of the trial on October 18th Judge Goettel made oral Findings of Fact and Conclusions of Law from the bench finding Continental liable to Hersent for losses covered by the Hull Policy (but not liable under the Protection and Indemnity Policy). Judge Goettel requested counsels' assistance in formalizing his oral opinion rendered on October 18th; and, after resolution of substantial disagreement as to the precise wording, Findings of Fact and Conclusions of Law (Jnt. App. 227a-244a) were "so ORDERED" by him on January 5, 1977.

On January 17, 1977 Continental moved (Jnt. App. 246a) for an order directing that Judge Goettel's Findings of Fact and Conclusions of Law and his related order (and any judgment thereon) be amended so as to grant judgment in favor of Continental rather than Hersent. Interlocutory Judgment (Jnt. App. 245a) holding Continental liable to Hersent under the Hull Policy and absolving Continental of liability under the Protection and Indemnity Policy was entered on January 20, 1977 and Continental's earlier motion for amendment was denied in an endorsement (Jnt. App. 261a-262a) on the motion papers dated February 4, 1977. Notice of Appeal (Jnt. App. 264a) was filed on February 14, 1977.

(C) Facts relevant to the issues.

The barge which capsized was built in 1943 as a square rake-ended steel derrick barge for the United States Army. It was flat-bottomed, had a length of 135 feet, a breadth of 50 feet, and a depth of 11 feet (FF 4A). Hersent's intended service for the barge and the equipment, including a large crawler crane, was utilization in the construction of an offshore platform which was to be

used for unloading oil from tankers into pipelines for conveyance to onshore tanks (FF 12). The mooring site for the barge, when on station, was to be a little more than a mile off Jacobs Point, Long Island, in eastern Long Island Sound (FF 17 and 23).

Hersent bareboat leased the barge in July of 1972 (FF 4A) and obtained marine hull insurance covering the barge and equipment from Continental that same month (FF 3). The barge was first moored by Hersent at the work site in August of 1972. Thereafter it made occasional trips to nearby Mattituck Inlet, after each of which it was returned to the offshore site where it remained until the December 1972 capsizing (FF 23). When the barge arrived at the construction site in August of 1972, the length of the boom of the crawler crane mounted on it was 160 feet (FF 24). At some time thereafter, the boom was lengthened to 170 feet at Mattituck Inlet, making it no longer feasible to secure the boom in its crotch by means of a bridle arrangement as had been done previously (FF 24).

On November 29, 1972 the barge was towed by the tug PAUMANOK into Mattituck Inlet (Pl. Ex. 16, Jnt. Ex. Vol. 43). On December 4, 1972 the barge, with the crawler crane and miscellaneous equipment aboard it, was towed from Mattituck Inlet to the construction site where it remained until its capsizing during the December 15-17 weekend (FF 23; Pl. Ex. 16, Jnt. Ex. Vol. 45). Dock builders at the construction site did the rigging and welding work and engineers ran the equipment (FF 20). Frank Carr was the foreman of the dockbuilders (FF 22) and Robert J. Green was the Hersent employee who was the superintendent in charge of the entire project (FF 18), including the shoreside aspects of the project (FF 19).

The barge, on December 14 (Thursday) and 15 (Friday), 1972, was moored south of the platform that was

being constructed by the use of four $1\frac{1}{8}$ inch wires, three leading from the barge's corners to mooring buoys anchored by 30-ton concrete blocks and one leading from the fourth corner to a $3\frac{1}{2}$ ton Navy anchor which had been placed generally to the northeast (FF 29). The barge was moored on an approximate north/south axis (FF 31).

The tug PAUMANOK was the attending tug for the work project and the crew boat TRACY MILLER was used to transport the workers from Mattituck Inlet (and a dock at another location on Long Island's shore) to the offshore job site. Hersent supplied the crew for the PAUMANOK and for the TRACY MILLER (FF 40).

The weather for the weekend in question originated from two low-pressure centers, one of which was inland and west of the Appalachian Mountains and the other of which was offshore and moving up the eastern seaboard. The offshore low-pressure center, with cyclonic winds surrounding it, had become the dominant one when it reached the latitude of Long Island Sound. The storm that developed was essentially a "northeast storm," as that phrase is customarily used—its storm center track having originated from the southwest but with strong northeast winds affecting the locality involved (FF 25; Zeltmann, 52a-53a, 58a-59a; Gosset, 60a-61a).

Heavy weather at the construction site was expected on Friday, December 15th (FF 37; Pl. Ex. 16, Jnt. Ex. Vol. 49) and the crew, which had boarded the barge in the early morning, welded pad eyes to the barge and secured some of the equipment with cable (FF 33) before leaving the barge at 9:45 a.m. (FF 26). At the time that the crew was taken off the barge, the wind was from the east and blowing at about 20 knots (FF 35). The National Weather Service forecast (FF 39)—effective at 11:00 a.m. of that Friday (December 15th) morning—was:

"Small craft warnings changed to gale warnings at 11:00 a.m. Northeast to east increasing to 30 to 40 knots with higher gusts later this afternoon and tonight. Northwestern winds 20 to 30 knots with higher gusts Saturday."

At the time of the work crew's removal from the barge at 9:45 a.m., Friday, December 15th, the wires leading from the barge to the northeast and to the northwest each had a length of approximately 1,000 feet. The wire from the southwesterly corner of the barge had a length of only 150 feet and the one from the southeasterly corner had a length of only 100 feet. The southerly lines were crossed in such a manner that the one attached to the southwest corner of the barge led out southeasterly and the one attached to the southeast corner led southwesterly (FF 34).

Two winches were mounted on the barge—one on the port side and the other on the starboard side—between the crawler crane and a trailer office (Pl. Ex. 7A, Int. Ex. Vol. 9). With these two diesel-powered double-drum winches the mooring wires, which led off the barge through fairleads, could be hauled in or paid out, there being on each drum approximately 1,400 feet of wire (FF 29). By use of these winches, the mooring lines had been drawn tight and then the locking dogs on the winches had been set (Green dep., 198a; Doyle, 151a). In leaving the barge moored as it was on Friday, December 15th, Project Manager Green was, from a seaman's standpoint, imprudent (FF 51) as it could not swing its head into the seas as the predicted winds shifted from northeast through north to northwest.

Before departing the barge at 9:45 a.m., Friday, December 15th, the crane operator lowered the crane's boom between short (12 to 18 inches) welded steel uprights on

the sides of the boom's cradle and he engaged the crane's houselock and swing brake (FF 26). No bridles or guy wires were used to secure the boom before the crew departed the barge (FF 24). The barge crew did not return to the barge between the time of leaving it at 9:45 a.m. of the Friday in question and the time of its capsize during the weekend (FF 38).

The gale that developed in eastern Long Island Sound produced winds from the northeast which backed to the northwest as the weekend progressed (FF 25). During Friday evening the wind, as recorded at nearby Falkner Island Light Station, had increased to 45/50 knots out of the east and northeast; and by Saturday afternoon it was coming from the northwest at about 60 knots (Def. Ex. M, Jnt. Ex. Vol. 89). The District Court found (FF 44) that the barge capsized while moored at its work site at some time between 5:00 p.m., Saturday, December 16th, and 8:00 a.m., Sunday, December 17th.

On Monday, December 19th, two divers dove under the overturned barge to make an inspection and to determine, if possible, the cause of the capsizing. Their initial report included findings that one hatch cover was missing, that another was hanging on a chain, and that four hatch covers were loose by $\frac{1}{4}$ of an inch (FF 55).

The amount of water that could have been admitted to the below-deck compartments of the barge *during the capsize* was very insignificant. (The word "capsize," in this context, means the short period during which the barge continued to roll over after the righting moment had ceased to exert a controlling force on the barge's stability [FF 50].) Since the barge was found in a semi-submerged condition, and since its hull was watertight, the Court below found that the barge must have taken in substantial amounts of water before it capsized (FF 47). As stated by Judge Goettel:

"The fact that Barge #136, after capsize, was found to be riding so low in the water indicates that there had been substantial or significant pre-capsize flooding." (238a)

THE ARGUMENT

POINT I

Hersent breached express warranties contained in the Hull Policy's "Storm and Heavy Weather Plan" with the consequence that Continental should be released from liability.

The full text of the Hull Policy's "Storm and Heavy Weather Plan" is as follows:

"In respect to the barge 'Hughes #136' it is warranted by the Assured that all of the conditions set forth in the Storm and Heavy Weather Plan attached and forming part of this policy will be strictly adhered to and complied with.

CONDITION A:

This condition is considered a major alert condition with a hurricane approaching Hatteras and the possibility of passing through or in the vicinity of the area.

1. All work to close down and boom be nested securely on cradles and lashed.
2. At least one tug with a minimum of 1000 H.P. will be called in to take vessel in tow.
3. While awaiting tug, all mooring lines will be buoyed-off and released, with vessel lying to her anchor only, ready for tow.

4. Tow will be then made to a safe berth and harbor, preferably Port Jefferson. Here vessel will be safely anchored or made fast alongside a protected pier.
5. There will be an experienced riding crew aboard to handle lines during tow, when anchoring or berthing, and during the storm condition.

CONDITION B:

Defined as an alert condition with a hurricane or northeast storm well offshore. Heavy swells can be expected from the East and Northeast, causing a vessel moored to roll heavily.

1. If conditions are forecast to be quite severe, crane booms will be lowered and cradled, and secured in place.
2. Gear and equipment on deck will be secured against movement.
3. Aft mooring lines will be slacked off enough to allow vessel to swing head into the seas and swells for better riding. If possible, vessel will be allowed to ride to head line moorings and anchor with fairly equal strain on each unit.
4. An alert will be given for tugs to stand-by in case conditions become unduly severe and assistance be required.

CONDITION C:

Defined as a warning status with severe squall weather.

1. Crane booms will be secured in place, with hoist gear and runners secured. Extra guys, if warranted, will be used for properly securing mast and boom against movement.

2. Loose gear and equipment will be secured on main deck.
3. Tugs will always be available in the event conditions deteriorate and assistance be needed.

It is further warranted by the Assured that one person will be designated responsible for making judgment as to the severity of conditions, and to see that the proper procedures are followed.

It is understood and agreed that the Company, at any time, may revise or add to the conditions of this plan by issuance of an endorsement.

Attached to and forming part of Policy No. HC 01 27 81 of the CONTINENTAL INSURANCE COMPANY."

Compliance with the warranties in the "Storm and Heavy Weather Plan" by Hersent was a condition precedent to liability on the part of Continental and breach of any thereof affords Continental a complete defense irrespective of any question of causation. See: *Levine v. Aetna Ins. Co.*, 139 F. 2d 217, 218 (2nd Cir. 1943) (breach of warranty that boat would be equipped with search light afforded defense to marine insurer).

It is settled that a warranty in a contract of insurance must be literally complied with; that the only question in such cases is whether the thing warranted to be performed was or was not performed. *Capital Coastal Corp. v. Hartford Fire Insurance Co.*, 378 F. Supp. 163, 172 (D.C. Va. 1974). In New York, the "literal performance" rule is followed where marine insurance is involved. *Kron v. Hanover Fire Ins. Co.*, 20 A.D. 670, 246 N.Y.S. 2d 848 (2nd Dep't 1964), aff'd 15 N.Y. 2d 521, 254 N.Y.S. 2d 119, 202 N.E. 2d 563 (1964); *F.B. Walker & Sons, Inc. v. Valentine*, 431 F. 2d 1235, 1240 (5th Cir. 1970).

To determine the meaning of a policy of insurance the court must look to the fair and reasonable construction of the policy in conjunction with the contemplation of the parties. *Schwartz v. Allstate Ins. Co.*, 85 Misc. 2d 854, 381 N.Y.S. 2d 379, 380 (1st Dep't 1976). As stated in *McGowan v. Connecticut General Life Ins. Co.*, 110 R.I. 17, 289 A. 2d 428, 60 A.L.R. 3d 853 (1972), at 60 A.L.R. 3d 855-856:

"Although the tragic consequences of the cycle and truck collision are regrettable, this court is still obligated to respect the express terms and conditions of the insurance contract. The policy must be examined in its entirety and the words used must be given their plain everyday meaning In taking an overall view of the policy, equal emphasis must be given to all its relevant parts. A policy is not to be described as ambiguous because a word is viewed in isolation or a phrase is taken out of context. A court should not, through an effort to seek out ambiguity when there is no ambiguity, make an insurer assume a liability not imposed by the policy." (Citations omitted)

Additionally, in the interpretation of language contained in an insurance policy, the court may take into consideration the character of the business of the insured and the usual hazards involved therein in ascertaining the intent of the parties. *McDowell Motor Co. v. New York Underwriters Ins. Co.*, 233 N.C. 281, 63 S.E. 2d 538, 540-541 (1951).

(A) The mandates of the Storm and Heavy Weather Plan's "Condition B" were activated by the adverse weather forecasts and/or Hersent's awareness of deteriorating weather conditions.

"CONDITION B," quoted in full *supra* at page 10, was defined in the Plan as an "alert condition" with a "north-east storm well offshore." Judge Goettel found (CL 10) that the "pressure center" of the initial eastern segment of the storm was "well offshore." This center, he also found (FF 25), became the dominant of the two centers which had been the genesis of the "essentially . . . north-east storm."

Project Manager Green, pursuant to the Plan's requirements, was the person designated by Hersent to follow the weather conditions and to see that appropriate procedures were undertaken with respect to such conditions (FF 5). The monitoring of marine weather forecasts was a simple matter for him (Pl. Ex. 6, Jnt. Ex. Vol. 6-7; Wildner, 160a-161a). Green, in any event, knew a storm was coming and this awareness prompted the securing of *some* of the equipment on the barge, with pad eyes and cable, during the early daylight hours of the morning of Friday, December 15th (FF 33).

The month was December, characteristically a tempestuous month of the year on United States' northeast coast. Project Manager Green, who had been with the company (the principal business of which was *marine* engineering and *marine* construction [P.T.O., 14a]) in that capacity for about twenty years (Miller, 92a-93a), must be deemed to have been conversant with the purpose and the import of the warranties contained in the "Storm and Heavy Weather Plan." Hersent produced no witness nor extrinsic evidence of any type to substantiate its contentions as to ambiguity in the wording of the Plan. Cf. *Pan Ameri-*

can World Air, Inc. v. Aetna Cas. & Sur. Co., 505 F. 2d 989, 1001 (2nd Cir. 1974) (Footnote No. 10). Judge Goettel's conclusion (CL 10) that the phrase "well offshore" was ambiguous has no basis in the trial evidence.

(B) Hersent breached the Plan's requirements having to do with the mooring lines.

Paragraph "3" of "CONDITION B" provided:

"Aft mooring lines will be slacked off enough to allow vessel to swing head into the seas and swells for better riding. If possible, vessel will be allowed to ride to head line moorings and anchor with fairly equal strain on each unit."

That the four mooring lines were left taut when the crew left the barge at 9:45 a.m. Friday, December 15th, is not in dispute. There is no trial evidence to the contrary. Although the north lines had been previously slacked off, all of the lines were later drawn taut (Green dep., 198a; Doyle, 151a) and left that way.

The barge was left moored on a north/south axis (Green dep., 198a). The Plan's "CONDITION B" contemplated a "northeast storm" with heavy swells coming from "the East and Northeast." Judge Goettel's conclusion (CL 12) that there was an ambiguity as to which were the barge's "[a]ft mooring lines" has no rational basis. Necessarily, if the barge was supposed to "head" into the northeaster the bow—for the purposes of this clause—would point towards Connecticut and the stern would point towards Long Island. The aft lines could only be the ones going out from the stern of the barge.

In any event, the trial evidence substantiated that the bow end of the barge was considered to be the one with the

crane on it (Smith, 71a, 79a; Tiedemann, 100a). The crane was on the north end with the boom pointing south (Green dep., 198a).

Judge Goettel concluded (CL 12) that the second sentence in the mooring clause, *supra*, was not a warranty. Even if so, the first sentence was clearly a warranty and it was breached.

(C) Hersent breached the Plan's requirement for the standing by of tugs.

Paragraph "4" of "CONDITION B" mandated that:

"An alert will be given for tugs to stand-by in case conditions become unduly severe and assistance be required."

There was a "Buoy Mike" near the construction site, anchored with large cement blocks and with a pelican-type hook on the top of it, at which the tug PAUMANOK had stood by on previous occasions (Wildner, 162; Pl. Ex. 16, Jnt. Ex. Vol. 41, 45). Leaving the tug hanging from "Buoy Mike," manned by a crew on "alert" status, was feasible (Wildner, 177a). It is uncontested that this was not done, the tug having been left at Mattituck Inlet, miles away, and its crew having been discharged for the weekend at 3:00 p.m., Saturday, December 16th (Pl. Ex. 16, Jnt. Ex. Vol. 49), which was prior to the time of the barge's capsizing.

The tug PAUMANOK could have departed Mattituck Inlet on Friday, December 15th, after the tug captain had become apprised of the gale warnings, with winds northeast to east, which had been issued by the National Weather Service as of 11:00 a.m. (FF 54). It would have been feasible to bring the tug alongside the barge at that time

(FF 54). This was not done and thereafter the tug became landlocked in Mattituck Inlet by reason of shoal waters at the mouth of the inlet and the storm conditions which developed (Wildner, 163a-167a). Clearly, the tug was in no position to give assistance to the barge when the weather conditions deteriorated and, in the context of the Plan, was not standing by.

(D) Hersent breached the Plan's requirement pertaining to securing of the crane's boom.

Paragraph "1" of "CONDITION B" states that:

"If conditions are forecast to be quite severe, crane booms will be lowered and cradled, and secured in place."

Before leaving the barge on Friday, December 15th, the crane operator did lower and cradle the boom and engaged the crane's houselock and swing brake (FF 26). No bridles or guy wires were used to secure the boom, however, as this method of securing had become unfeasible after Hersent had lengthened the boom by 10 feet (FF 24).

Paragraph "2" of "CONDITION B" provided that "[g]ear and equipment on deck will be secured against movement." This was done by the crew with respect to some of the equipment by means of lashing (FF 33). In determining the proper construction to be given a clause in question, resort may be had to the other provisions of the policy. *Hartford Fire Ins. Co. v. Empire Coal Min. Co.*, 30 F. 2d 794, 797 (8th Cir., 1929). Effect must be given to the dominant purpose which the policy clearly reveals. *Great Lakes Transit Corp. v. Interstate Steamship Co.*, 301 U.S. 646, 652-653 (1937). Continental submits that Judge Goettel clearly erred in not construing the word "secured" as to require lashing of the boom.

POINT II

The capsizing of Barge No. 136 was not a fortuitous event occurring through extraordinary action of the elements.

The Hull Policy (Def. Ex. A, Jnt. Ex. Vol. 56) stated a warranty, pertaining to navigation limits, which limited the barge's employment "... to the use and navigation of the Long Island Sound and New York Harbor." The Hull Policy also stated that the coverage included the "perils ... of the waters named herein, ..."

It is settled maritime law that a marine policy of hull insurance is not an all-risk policy, and that such coverage extends only to losses resulting directly from a peril enumerated in the policy. An insured claiming under a policy of marine insurance must establish that his loss was due to a specified peril covered in the policy and that he has complied with all relevant policy terms and conditions. *Vining v. Security Insurance Co. of New Haven*, 252 So. 2d 754, 756 (La. App. 1971) (stripping of a jam nut resulted not from a peril of the sea but from ordinary wear and tear). As stated in the *Vining* case at 252 So. 2d 757:

"The clear majority rule is that the stresses of ordinary wind and wave action do not constitute perils of the sea in instances of this nature."

* * *

"Circumstances which are ordinarily encountered, such as predictable winds, tides, wave actions and conditions of the water, do not fall within the classification of perils of the sea as the term is used in policies of marine hull insurance."

See also: *College Point Dry., Etc. v. National U. Fire I. Co.*, 392 F. Supp. 277, 279 (D.C.S.D.N.Y. 1974) (the in-

sured must bear the burden of proof that the cause of the sinking comes within the coverage of the insurance policy); *Sipowicz v. Wimble*, 370 F. Supp. 442, 448 (D.C.S.D.N.Y. 1974) (a loss is not occasioned by a peril of the sea when it results from the defective, deteriorated or decayed condition of the vessel or from ordinary wear and tear); *The Xantho*, [1887] 12 App. Cas. 503, 509 (to recover under "perils of the sea" there must be something which could not be foreseen as one of the necessary incidents of the adventure).

By established standards for deck-cargo barges, the static stability of the barge was well in excess of requirements (FF 16). On the morning of Friday, December 15th, the metacentric height of the barge, and its load, was such that it was ample for stability and would have met United States Coast Guard requirements. Judge Goettel did find (FF 47), however, that there had been substantial or significant pre-capsize flooding and that (FF 55) the divers found one hatch cover missing, another hanging on a chain, and four of them loose by $\frac{1}{4}$ of an inch.

As stated in *Pan American World Air, Inc. v. Aetna Cas. & Sur. Co.*, 505 F. 2d 989 (2nd Cir. 1974), at page 1006:

"Remote causes of causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words 'due to or resulting from' limit the inquiry to the facts immediately surrounding the loss." [citations omitted].

What was the "efficient physical cause" of the barge's capsizing? Judge Goettel clearly erred in not finding that

it was the pre-capsize flooding brought about by the barge's unseaworthiness. He further erred in not finding that there was nothing fortuitous or unexpected about the occurrence of a "northeaster" in the month of December in eastern Long Island Sound. Hersent failed, at the trial below, to bring itself within the "perils . . . of the waters" of Long Island Sound head of coverage.

POINT III

The implied warranty of seaworthiness was breached. Hersent knowingly permitted Barge No. 136 to be moored in an exposed position in Long Island Sound while in an unseaworthy condition.

There exists in a time marine insurance policy an implied warranty of seaworthiness. It is impliedly warranted that the vessel is seaworthy as of the very moment of the attachment of the insurance; and if the vessel is in fact unseaworthy at the time the insurance were to attach, the breach avoids the policy. The implied warranty is a continuing obligation that the vessel owner (or insured), from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition. *Lemar Towing, Inc. v. Fireman's Fund Insurance Co.*, 352 F. Supp. 652, 660 (D.C. La. 1972), *aff'd per curiam* 471 F. 2d 609 (5th Cir. 1973). As also stated in the *Lemar* case at 352 F. Supp. 660:

" . . . [A] breach of the implied negative warranty after the policy has attached does not avoid the policy altogether and only exonerates the underwriter for loss or damage proximately caused by the unseaworthy condition."

See also: *Gulfstream Cargo, Ltd. v. Reliance Insurance Company*, 409 F. 2d 974 (5th Cir. 1969).

In the foregoing "POINT II" of this brief, Continental has contended that an unseaworthy condition proximately caused the capsizing of the barge. When the barge was towed out of Mattituck Inlet on December 4, 1972 (Pl. Ex. 16, Jnt. Ex. Vol. 45) to be put back on station, the crane's boom had an extra 10 feet on it making the previous securing arrangement unfeasible (FF 24). Additionally, it may be reasonably inferred that the condition regarding the loose and missing hatch covers existed at the time of the barge's departure from Mattituck Inlet.

Although briefed for him, Judge Goettel rendered no conclusion having to do with the breach-of-implied-warranty issue which had been framed in the Pre-Trial Order (P.T.O., Jnt. App. 27a). Judge Goettel erred in not concluding that Continental was released from liability owing to Hersent's breach of the implied warranty of seaworthiness.

POINT IV

Project Manager Robert Green was not the master of the barge in the context of the "Inchmaree" clause.

The "Inchmaree" clause, contained in the Hull Policy (Def. Ex. A, Jnt. Ex. Vol. 54), reads, in part, as follows:

"This insurance also covers loss of or damage to the vessel named herein directly caused by: . . . Negligence of master, mariners, engineers or pilots; provided such loss or damage has not resulted from want of due diligence by the assured, the owners or managers of the vessel, or any of them."

Continental contends that Green was a *manager* and that Judge Goettel clearly erred in concluding (CL 8) that

Green occupied the position of *master* of the barge within the meaning of the Inchmaree clause of the Hull Policy.

Robert Green was in charge of the entire construction project (FF 18). As Project Manager for Hersent at the Northville Industries job site, his responsibilities included the scheduling and coordination of the construction of the terminal as specified in the pertinent specifications and drawings. In this capacity he advised the personnel of the tug PAUMANOK, the crew boat TRACY MILLER, a boat named WAYZOFF, and the barge where they were to be working at specific times (FF 19). He shared an office with another Hersent employee at the Northville Industries plant (FF 21) and was responsible, as has been stated previously herein, for the shoreside aspects of the project (FF 19).

Frank Carr was the dockbuilder foreman on the project. His duties included the allocation of work, seeing to it that the work was properly performed and informing his men whether to report to work on Saturdays. His other duties included the direction of welding operations, lashing procedures, dewatering operations, towing operations aboard the barge when it was being towed, giving hand signals to the crane operator and the direction of the operations of the winches (FF 22). There is no evidence that Green supervised Carr or gave overall instructions to Carr with respect to the welding, lashing, dewatering, towing, giving of hand signals to the crane operator or the operation of the winches (Doyle, 147a).

The Inchmaree clause was designed to insure against seagoing or operational negligence of the master (whether or not he is also the charterer or owner) and to exclude from coverage damage due to the shoreside failure of the shipowner's managerial staff properly to prepare or equip the vessel for the voyage or service she is about to perform. *Allen N. Spooner & Son, Inc. v. Connecticut Fire Ins. Co.*, 314 F. 2d 753, 758 (2nd Cir. 1963).

The barge was unmanned when it capsized. To the extent that it had a "master" when it was manned, this individual, Continental contends, was the foreman, Frank Carr. Certainly, Green was not the "master" of the tug PAUMANOK, its captain being Arnold Wildner (Wildner, 155a). Although Captain Wildner was subject to Green's managerial supervision, this circumstance did not derogate from Captain Wildner's status as "master" of the tug. Similarly, Green's supervision of the entire project did nothing to detract from foreman Carr's responsibilities with respect to activities aboard the barge. If anyone need be deemed the "master" of the barge for Inchmaree purposes, it would most plausibly be foreman Carr.

The situations contributing to the capsize of the barge stemmed largely from *lack of preparedness* (Freelund, 124a-125a). Preparational carelessness to which Robert Green was privy may not be excused. *Spooner, supra*, 314 F. 2d at p. 758. When an oceangoing vessel is about to depart a harbor, it is first readied for sea in many ways. By analogy, when the barge was faced with a brewing marine threat, i.e., an approaching gale, it too should have been "readied." This duty was essentially a managerial rather than a navigational function. Hersent had a non-delegable shoreside obligation to use due diligence to make Barge 136 seaworthy. See: 41 *Tulane Law Review* (The Hull Policy: The Inchmaree Clause) 335, 339 (Feb. 1967). Project Manager Green's "want of due diligence" causing the loss was Hersent's failure through him and, as an "assured" under the Inchmaree clause, Hersent may not recover.

CONCLUSION

The judgment below should be reversed and judgment should be granted in favor of plaintiff-appellant.

Respectfully submitted,

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THE CONTINENTAL INSURANCE COMPANY,
Plaintiff-Appellant,

against

HERSENT OFFSHORE, Inc.,
Defendant-Appellee.

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Bernard S. Greenberg
deposes and says that he is over the age of 21 years and resides at 162 E. 7th St. N.Y., N.Y. being duly sworn,

That on the 12th day of May, 1977, upon
he served the annexed Brief for Plaintiff-Appellant, Joint Appendix &
Joint Exhibit Volume

Warner & Gillers, P.C.

Attorneys for Defendant-Appellee

500 Fifth Ave.

N.Y., N.Y. 10036

in this action, by delivering to and leaving with said attorneys
2 briefs, 2 joint appendix & 1 exhibit volume true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons
mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 12th
day of May, 1977

} Bernard S. Greenberg

Robert W. Johnson

ROBERT W. JOHNSON
Notary Public, State of New York

Qualified in Delaware County
Commission Expires March 30, 1978

